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In the Supreme Court of the United States

OCTOBER TERM, 1983

SAFEWAY STORES, INCORPORATED, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AND
TEAMSTERS LOCAL 745

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

**MEMORANDUM FOR THE EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION**

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MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

1. Petitioner is a Maryland corporation that is engaged in the grocery supply and retail grocery business in Dallas, Texas (Pet. App. B1). Between April 1972 and August 1975, four of petitioner's employees filed charges with the Equal Employment Opportunity Commission (EEOC), alleging that petitioner had discriminated against them in its employment practices on the basis of race or national origin in violation of Title VII of Civil Rights Act of 1964, 42 U.S.C. & Supp. V 2000e *et seq.*¹ The Commission

¹On April 10, 1972, Willis W. Taylor filed a charge with the EEOC, alleging that he had been denied a promotion to truck driver because he is black (Pet. App. B4). On January 10, 1974, Concepcion Rodriguez and Fernando Cantu filed separate charges, alleging that they were both not hired for positions in petitioner's warehouse because of their national origin (*id.* at B3). On August 9, 1975, Billy G. Faison filed a

investigated all four charges and found reasonable cause to believe that the charges were true. Pursuant to Section 706(b) of Title VII, 42 U.S.C. 2000e-5(b), the Commission then undertook to conciliate the dispute with petitioner; the Commission invited Teamsters Local 745, the Union that is the collective bargaining agent for petitioner's employees, to participate in these discussions, but it declined (Pet. App. A5).

The EEOC, petitioner and the charging parties entered into three conciliation agreements designed to settle the four charges filed with the Commission. In all three agreements, petitioner, without admitting that it had ever discriminated against the charging parties, agreed to give all of them back pay and retroactive seniority (Pet. App. B2-B4).

Several months after petitioner signed the conciliation agreements, it refused to revise its seniority roster; instead, it assigned the charging parties seniority dates based on their actual date of hire. Petitioner claims (Pet. 5) that it took this action in response to the Union's threats of economic retaliation against petitioner and threats of violence against the charging parties by some of petitioner's employees (see Pet. App. B5).²

charge against petitioner alleging that it had refused to hire him for a truck driving position because of his race (*id.* at B2). Eventually, Taylor was promoted and Rodriguez, Cantu and Faison were all hired by petitioner (*id.* at B2-B4).

²Initially, petitioner, three of the charging parties and the Commission entered into addenda to their agreements, which were intended to give petitioner time to reach some kind of agreement with the Union. Petitioner agreed to protect the charging parties from layoffs, but would postpone modifying the seniority dates for all other purposes for two years (Pet. App. B3-B4). After the two years, petitioner was still unable to reach any agreement with the Union and therefore decided not to comply with the conciliation agreements (*id.* at B5-B6).

2. The EEOC filed the instant suit against petitioner in the United States District Court for the Northern District of Texas, seeking specific performance of the conciliation agreement's provisions. In order to enforce the provision of retroactive seniority for the charging parties, the Commission joined the Union as a necessary party under Fed. R. Civ. P. 19.

After a bench trial, the district court entered judgment in favor of the Commission (Pet. App. B1-B12). The court found (Pet. App. B7-B8) that it had jurisdiction over this suit under 42 U.S.C. 2000e-5(f)(3), which confers jurisdiction upon federal courts over any "actions brought under [Title VII]."³

On the merits, the district court held that the conciliation agreement should be enforced. The court reasoned that the conciliation agreement is enforceable unless its provisions violate public policy or are otherwise illegal (Pet. App. B8). The court concluded that the provision in the conciliation agreements requiring retroactive seniority did not violate public policy since that is the "ordinary" relief granted to victims of discrimination. *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976). The court also held that the conciliation agreement does not conflict with Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(h), because that provision does not restrict relief that otherwise would be appropriate and that retroactive relief for the charging parties, which slotted them into petitioner's seniority roster, was appropriate in this case (Pet. App. B9).

³Additionally, the district court asserted that its jurisdiction was properly invoked under 28 U.S.C. 1337 (claims arising under Acts of Congress regulating commerce); 28 U.S.C. 1343(4) (Civil Rights jurisdiction); and 28 U.S.C. 1345 (actions by United States or its agencies) (Pet. App. B8).

3. Both petitioner and the Union appealed. Petitioner challenged the jurisdiction of the district court to enforce a conciliation agreement and the authority of the Commission to file suit in order to enforce a conciliation agreement, at least where the employer had not admitted that it had discriminated against its employees. The Union challenged the district court's ruling enforcing that portion of the conciliation agreement that provided retroactive seniority to the charging parties.

The court of appeals affirmed in part and reversed in part (Pet. App. A1-A26). The court rejected all of petitioner's claims; it held that the district court properly exercised jurisdiction over the EEOC's suit (*id.* at A7-A12) and that the Commission had authority to enforce its conciliation agreement with petitioner through a suit for specific performance (*id.* at A12-A17).

The court of appeals, however, upheld the Union's challenge. The court concluded that a grant of retroactive seniority cannot be made in the absence either of the consent of the Union or an opportunity by the Union to participate in judicial proceedings to determine whether retroactive seniority is appropriate relief (Pet. App. A20). The court found support for this result in this Court's recent decision in *W.R. Grace & Co. v. Local Union 759*, No. 81-1314 (May 31, 1983), slip op. 13-14, where the Court stated that "[a]bsent a judicial determination, the Commission, not to mention the Company, cannot alter the collective bargaining agreement without the Union's consent."

In response to the contention that the conciliation agreement did not result in the "wholesale destruction" of the collective bargaining contract, but involved merely slotting the charging parties into their "rightful places" on existing seniority rosters, the court held: "[W]e cannot agree that a difference in the degree of conflict with the

collective bargaining structure, beyond *de minimis*, can affect an ultimate decision. Were we to accept [this] argument, we would in essence adopt a rule which recognized gradations in the rights of a party to due process" (Pet. App. A23).

Since the Union had not consented, and the court of appeals determined that petitioner had violated the collective bargaining agreement, retroactive seniority was available only if the charging parties or the Commission filed suit in federal court and obtained a judicial decree providing seniority relief under Section 706(g) of the Act, 42 U.S.C. 2000e-5(g) (Pet. App. A23-A24). The court of appeals acknowledged that the conciliation process is the preferred method of resolving Title VII claims, and that this process might be complicated by its holding that the Union is entitled to a "veto" power over that portion of a conciliation agreement that violates the collective bargaining agreement. Nevertheless the court concluded, that this problem did not require it to enforce a settlement between two consenting parties affecting the interests "of a third and protesting one, leaving it bound without trial to an agreement to which it did not subscribe" (Pet. App. A24).

4. Petitioner does not seek review of any of the issues it raised and lost in the courts below; instead, it seeks review of the court of appeals' determination that the conciliation agreement's retroactive seniority provision is not enforceable over the Union's objection. In the court of appeals, the Commission did argue that the retroactive seniority provision should be enforceable even over the Union's objections. The government has decided, however, not to petition for a writ of certiorari in this case, because there is no direct conflict between the decision below and any decision of this Court or any other court of appeals and because it is far from clear that the decision below will significantly impair the Commission's efforts to enforce Title VII fully.

a. Petitioner argues (Pet. 8-9) that the decision of the court of appeals—that retroactive seniority cannot be granted over the union’s objection without an adjudication on the merits of the discrimination claim—conflicts with this Court’s decision in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).⁴ In *Zipes*, however, awards of retroactive seniority were based on a judicial finding of discrimination. The district court granted summary judgment in plaintiffs’ favor on the issue of defendant TWA’s Title VII liability. The court then divided the plaintiff class into two subclasses for the purpose of settling the remedial issues. After a hearing in which the union was permitted to intervene, retroactive seniority relief was ordered for each class member. Because the district court’s summary judgment ruling ran in favor of the entire plaintiff class, this Court held that there had been a final determination of liability, which was no longer reviewable by the Court, and therefore retroactive seniority relief was warranted under *Franks v. Bowman Transportation Co.*, *supra*.

No other federal court has decided the issue of whether, in the context of a collective bargaining agreement prescribing seniority rights, an employer and the Commission may enter into a conciliation agreement that provides retroactive “rightful place” seniority relief to individual charging parties without the Union’s consent. It is, therefore, premature for this Court to consider this issue without the benefit of further consideration by the lower federal courts.

⁴Petitioner also relies (Pet. 8-9) on *Moore v. City of San Jose*, 615 F.2d 1265 (9th Cir. 1980) and *Airline Stewards & Stewardesses Ass’n, Local 530 v. American Airlines*, 573 F.2d 960 (7th Cir.), cert. denied, 439 U.S. 876 (1978), both of which were decided before *W.R. Grace & Co.* Neither of those cases involved the situation in this case where the Commission was attempting to enforce a conciliation agreement that had been repudiated by the employer.

b. Nor does the decision below present insuperable obstacles to the Commission's continuing efforts to enforce Title VII.⁵ This case is an oddity. The litigation came about only because petitioner refused to comply with the conciliation agreement. It is at least doubtful that the Union could have initiated litigation on this issue if petitioner had simply awarded the charging parties the agreed upon retroactive seniority. In that event, under the standard collective bargaining agreement, such as the one in this case that contains an arbitration clause, the proper course for the Union to follow would be to seek to arbitrate the dispute on the ground that the employer's action in entering into the conciliation agreement violated the collective bargaining agreement. A federal court would have no basis in a suit by the Union under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. 185, to decide whether the conciliation agreement violates the collective bargaining agreement; that is the province of the arbitrator. See *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). If the arbitrator concludes that the collective agreement is *not*

⁵The Commission settles cases through a number of different routes. See, e.g., 29 C.F.R. 1601.20. In fiscal year 1983, the Commission entered into 310 conciliation agreements after a finding of reasonable cause to believe an employer had discriminated. Only 12 of those conciliation agreements contained retroactive seniority relief. Thus, the problem presented by this case does not appear at present to be a frequently recurring one.

violated by the grant of retroactive seniority,⁶ then the matter will be resolved without recourse to any judicial process. If the arbitrator decides that the conciliation agreement is inconsistent with the collective bargaining agreement, then it may be that the Commission or the charging party will have to go to court and obtain a judicial decree in order to acquire retroactive seniority.⁷ Such a course is cumbersome, but protects the various interests affected by the grant of retroactive seniority to putative discriminatees. That process was pretermitted here because of petitioner's unusual decision to sign an agreement and then repudiate it, thereby prematurely forcing the issue into

⁶For instance, in this case an arbitrator could decide that the provision defining seniority in terms of the employee's date of hire was not intended by the parties to preclude an employer from granting seniority to a victim of discrimination. The arbitrator could conclude that rightful place seniority under these circumstances is warranted by a provision, which is included in many collective agreements, forbidding both parties from discriminating on the basis of race or national origin. Such an award would be enforced judicially if the Union were to challenge it since it draws its "essence" from the terms of the collective bargaining agreement, see *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. at 599, and clearly is consistent with public policy, see *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976). Compare *W.R. Grace & Co. v. Local Union 759*, No. 81-1314 (May 31, 1983), slip op. 8, 13-14.

⁷The Commission argued in its petition for rehearing in the court of appeals that *W.R. Grace & Co. v. Local Union 759*, *supra*, could be distinguished from this case because the conciliation agreement in *W.R. Grace* completely reshaped the seniority system in the collective bargaining agreement on the basis of the circuit law prior to this Court's decision in *Teamsters v. United States*, 431 U.S. 324 (1977), whereas the conciliation agreement here merely slots putative victims into the employer's seniority list.

federal court. We doubt that this sequence of events will recur very often, and therefore the decision below may not affect very many future cases.

Respectfully submitted.

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